Supreme Court, U.S.
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No. 03-667

IN THE

Supreme Court of the United States

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 1, and MARK KING,

Petitioners,

v.

J & J CONSTRUCTION COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The question presented by this case and by our petition for certiorari is:

> "Whether, under the First Amendment's Petition Clause, statements addressed to government representatives critical of a third party's performance of a public function or fitness to perform a public function are entitled to the protection of the 'actual malice' standard of *New Times Co. v. Sullivan*, 376 U.S. 254 (1964), against defamation claims brought by the third party." Pet. i.

In the petition, we showed that the lower courts are divided on this question, with the Seventh Circuit and the highest courts of Washington and Maryland according petitioning statements the full protection of the *New York Times* "actual malice" standard and the Michigan Supreme Court and the Eighth Circuit refusing to accord petitioning statements such protection. *See* Pet. 10-14. We showed, as well, that this division cannot be traced to any disagreement over basic First Amendment principles and arises, instead, from a disagreement as to the proper reading of—and the proper inferences to be drawn from—this Court's decision in *McDonald v. Smith*, 472 U.S. 479 (1985). *See* Pet. 16-19.

Respondent's brief in opposition asserts that there is no such division among the lower courts because the Seventh Circuit, Washington and Maryland cases we cite involved petitioning statements critical of government employees rather than "private figures" and, according to respondent, the status of the defamation plaintiff was the basis of each decision. Br. in Opp. 3-4. Respondent's effort to wish away the lower court conflict fails.

There can be no question that the Seventh Circuit, the Washington Supreme Court and the Maryland Court of Appeals accorded Petition Clause protection to the statements

in question and applied the *New York Times* "actual malice" standard on the basis, to use Judge Arnold's apt phrase, of "the nature of the communication and not the *status* of the defamation plaintiff." *IBP Confidential Business Documents Litigation*, 800 F.2d 787, 789 (8th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987) (Arnold, J., dissenting) (internal quotation marks omitted; emphasis in original).

In *Stevens v. Tillman*, the Seventh Circuit identified "*two* grounds"—a Free Speech Clause ground and a Petition Clause ground—for applying the *New York Times* standard: "that [the plaintiff] is a public official, *and* that the speakers were exercising their right to petition the government for redress of grievances." 855 F.2d 394, 403 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) (emphasis added). As to the Petition Clause ground, the Seventh Circuit concluded that "statements made directly to [government representatives] are governed by the *New York Times* standard under the holding of *McDonald v. Smith*, 472 U.S. 479 (1985)." *Id.* In elaborating on this ground of its decision, the Seventh Circuit explained:

> "The first amendment prohibits efforts to ensure 'laboratory conditions' in politics; speech rather than damages is the right response to distorted presentations and overblown rhetoric. A campaign to influence [government representatives] is classic political speech; it is direct involvement in governance, and only the most extraordinary showing would permit an award of damages on its account." *Id.*

Similarly, in *Richmond v. Thompson*, 130 Wn.2d 368, 922 P.2d 1343 (1996), the Washington Supreme Court rested its ruling that the *New York Times* "actual malice" standard applied on two grounds: the "public official" status of the plaintiff, *id.* at 1348, *and* the petitioning nature of the speech in question, *id.* at 1349. As to the latter, the *Richmond* court

held that "the proper standard under the petition clause must be the *New York Times* qualified privilege." *Id.*

"[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other.'" *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924) (quoting *Union Pacific R.R. Co. v. Mason City & Fort Dodge R.R. Co.*, 199 U.S. 160, 166 (1905). Thus, the fact that the Seventh Circuit and the Washington court rested their decisions on both a Free Speech Clause ground and a Petition Clause ground does nothing to lessen the authority of their Petition Clause rulings that whenever "speakers [a]re exercising their right to petition the government for redress of grievances," the Petition Clause requires that their "statements made directly to the [government] . . . are governed by the *New York Times* standard." *Stevens*, 855 F.2d at 403.

The First Amendment ruling in *Miner v. Novotny*, 304 Md. 164, 498 A.2d 269, 271 (1985), is based solely on "the constitutionally-based privilege attaching to petitions to the government for redress of grievances." The Maryland Court of Appeals rested its decision that the *New York Times* "actual malice" standard applied on the petitioning nature of the speech in question and does not even refer to the "public" or "private" status of the defamation plaintiff. *Id.* at 271-272.

The *Stevens*, *Richmond*, and *Miner* decisions thus *require* the federal district courts within the Seventh Circuit and the state courts of Washington and Maryland to accord *New York Times* protection to *all* petitioning statements critical of a third person's performance of or fitness to perform a public function without regard to the third person's "public" or "private" status. In contrast, the decision below and the *IBP* decision *preclude* the state courts of Michigan and the federal district courts within the Eighth Circuit from according *New York Times* protection to such petitioning statements where

the person whose performance of or fitness to perform a public function is being criticized is a "private figure," such as a government contractor.[1]

This sharp outcome-determinative division among the lower courts on the scope and nature of the Petition Clause protection for statements made directly to the government concerning a third party's performance of or fitness to perform a public function—and of the proper reading of this Court's *McDonald v. Smith* decision—is not only of great doctrinal significance, it is also of great practical importance. "Americans by the thousands are being sued, simply for exercising . . . the right to communicate [their] views to [their] government officials . . . on public issues." G. Pring & P. Canan, *SLAPPs; Getting Sued for Speaking Out* 1 (1996). By far the greatest number of such SLAPP suits are filed by "private figures" like J & J Construction—companies that see petitioning activities as "threats to their land ownership, development plans, business operations, contract expectations, profits, or employment." *Id.* at 216.

The Court should grant certiorari to resolve the disagreement among the state and federal courts over the important First Amendment question presented by this case.

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[1] It is not at all clear that the federal district courts within the State of Michigan would rule in the same way as the Michigan courts in this regard, as the Sixth Circuit has expressed its agreement with the Seventh Circuit that "statements made directly to [government representatives] are governed by the *New York Times* standard under the holding of *McDonald v. Smith*, 472 U.S. 479 (1985)." *Eaton v. Newport Board of Education*, 975 F.2d 292, 299 (6th Cir. 1992), quoting *Stevens*, 855 F.2d at 403.

Respectfully submitted,

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